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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 319

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, and CLARENCE G. MORSE, MARITIME ADMINISTRATOR,
Respondents,

MATSON NAVIGATION COMPANY,
Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of Intervenor Matson Navigation Company in Opposition

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QUESTION PRESENTED

The questions allegedly presented are stated in the petition in a highly argumentative fashion. We believe that only one question is presented by these proceedings and that it may be fairly stated as follows:

Did the court below err in its holding that it lacked jurisdiction to review an order of the Federal Maritime Board and Maritime Administration entered under authority of the Merchant Marine Act, 1936, when the only source of jurisdiction was a statute, the Review Act of 1950, affording review in that court only of orders "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended * * *"?

STATEMENT OF THE CASE

Petitioner Pacific Far East Line, Inc. (hereafter called PFEL) is a subsidized steamship operator in foreign trade (R. 5). By electing, in 1953, to obtain an operating subsidy from the United States pursuant to Titles VI and VIII of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. 1171-82, 1211-27, PFEL likewise necessarily elected to be bound by the restraints imposed by Congress in Section 805(a) of that Act, 46 U.S.C. 1223(a). The restraints of that section, intended to prevent unfair competition by subsidized foreign-trade operators against unsubsidized operators in the domestic trade, derive solely from a voluntary election to receive the Government's bounty. They are inapplicable to unsubsidized operators, who are free, as was PFEL prior to 1953, to enter the Hawaiian trade without franchise or permission of any kind (R. 18).

Pursuant to Section 805(a) and the terms of its subsidy contract, PFEL applied to the Federal Maritime Board and Maritime Administration (hereafter called the Board) for permission to enter the domestic Hawaiian trade in competition with, among others, Matson Navigation Company, an unsubsidized operator in that trade. After a lengthy hearing before the Board's examiner, briefs, exceptions and oral argument, the Board denied the permission sought on both

of the alternative statutory grounds, (1) that such permission would be prejudicial to the objects and policy of the Act and (2) that it would result in unfair competition to Matson (R. 17-18).

PFEL thereupon launched a two-pronged attack on the Board's order. It filed the present proceedings in the court below, basing jurisdiction on Section 2 of the Review Act of December 29, 1950, 64 Stat. 1129, 5 U.S.C. 1032, and simultaneously filed a complaint in the United States District Court for the District of Columbia (No. 1708-57), basing jurisdiction on Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1009. The latter case is now pending before the court on motions and cross-motions for summary judgment and other relief.

In the court below, the Board moved to dismiss for lack of jurisdiction. The United States concurred and Matson filed its own motion to the same end. Apparently deeming it advisable to consider the question of jurisdiction in the light of the full record and more complete briefing and deliberation, the court denied the motions "without prejudice to their renewal at the hearing of this case on the merits" (R. 637).

The jurisdictional question was thereafter renewed in the briefs on the merits.* Following such further considera-

*Arguments were presented to the court below on aspects of the jurisdictional question in addition to the inapplicability of the Review Act of 1950. These included the point that the petition for review was not timely filed, that the order of which review was sought was not final and that the Board's order was, by its nature, of a discretionary character not subject to judicial review. In view of its disposition of the case, the court did not reach these questions, and they are not presented by the petition. If certiorari should be granted, these and other questions may be appropriate for consideration.

tion, the court dismissed on the ground that a "'plain meaning' reading" of the Review Act compelled dismissal (R. 640-41).

ARGUMENT

Scant attempt is made in the petition to show any of the grounds for certiorari specified in Rule 19(1) and the decisions of this Court.

The Review Act of 1950 has been on the books for almost eight years. Yet that period has produced not a single prior case raising the question decided below. This would seem to be ample evidence that the question lacks the importance required for decision by this Court.

The attempt to spin out "the seed of conflict" (Petition, p. 12) between the decision below and a footnote dictum in the Ninth Circuit (*Richfield Oil Corp. v. United States*, 207 F.2d 864, 869, n. 6a) scarcely requires an answer.*

These considerations apart, the decision below was clearly correct. For reasons which we understand will be more fully presented in the brief of the Government respondents in opposition, the unequivocal language of the Review Act of 1950, its legislative history and the structure and purpose of the Merchant Marine Act, 1936, lead to the inescapable conclusion that the court below lacked jurisdiction.

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*The Ninth Circuit made it clear in the footnote referred to that the question of the applicability of the Review Act of 1950 was not presented or decided. In fact, the footnote assumes that the Review Act applies only to orders entered under two specified sections of the Shipping Act, 1916. It then goes on to mention that the reference to the Maritime Administration may indicate otherwise.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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September 29, 1958.